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No. 89-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, *et al.*,
Petitioners,

v.

COMITE PRO RESCATE DE LA SALUD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

	Page
A. Petitioners' Discharges Fall Within The Domestic Sewage Exclusion	2
B. The Court Of Appeals' Decision Is Not Consistent With EPA's Regulatory Definition Of The Domestic Sewage Exclusion	4
C. The Narrow Construction Of The Domestic Sewage Exclusion EPA Urged In Its Amicus Curiae Brief Below Was Not One That EPA Officially Adopted Or Consistently Held	5
D. Certiorari Should Be Granted Because The Decision Below Conflicts With Applicable Decisions Of This Court	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Batterton v. Francis, 432 U.S. 416 (1977) 8
Bowen v. Georgetown University Hospital, 109 S. Ct. 468 (1988) 8
Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 8
Investment Company Institute v. Camp, 401 U.S. 617 (1971) 8

Statutes and regulations:

Clean Water Act
Section 402, 33 U.S.C. § 1342 3
Section 307(b), 33 U.S.C. § 1317(b) 3
Resource Conservation & Recovery Act
Section 1004(27), 42 U.S.C. § 6903(27) ..... 2 & n.1, 3 & n.3
Section 1006(a), 42 U.S.C. § 6905(a) 3
Section 1006(b), 42 U.S.C. § 6905(b) 5 n.4
Section 7002, 42 U.S.C. § 6972 ..... 5 n.4
Section 7003, 42 U.S.C. § 6973 ..... *passim*
Section 7003(a), 42 U.S.C. § 6973(a) 2 n.1, 5 n.4

Regulations and Rules:

40 C.F.R. Part 261 ..... 4, 5
40 C.F.R. § 261.4(a)(1) 4, 6
40 C.F.R. § 261.4(a)(1)(ii) 3 n.3
40 C.F.R. § 261.1(b)(2) 4, 5
45 Fed. Reg. 33084, 33090 (May 19, 1980) ..... 4, 6-7 & n.5
Sup. Ct. R. 10.1(c) 8

Miscellaneous:

EPA, *Guidance For Implementing RCRA Permit-By-Rule Requirements At POTWs* (July 21, 1987) 5-6
EPA, *Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works* (Feb. 1986) 7 n.6

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REPLY BRIEF FOR PETITIONERS

Respondents make three principal arguments. First, they contend that petitioners' discharges cannot fall within the domestic sewage exclusion because "domestic sewage" is defined as "sanitary waste," while petitioners' discharges are "industrial wastes." Second, they argue that EPA's regulatory definition of the DSE is consistent with the court of appeals' decision. Finally, respondents claim that the court of appeals did not err in relying upon the positions EPA advanced in its *amicus* brief below because those positions were consistent with EPA's longstanding agency policies. Each of these arguments is without merit.

A. Petitioners' Discharges Fall Within The Domestic Sewage Exclusion

Respondents attempt to carve a distinction between "domestic sewage" and "industrial discharges." "Domestic sewage," they argue, has been defined by the EPA as "sanitary wastes;" since "industrial discharges" cannot be sanitary wastes, respondents continue, they cannot be "domestic sewage" either and, therefore, cannot fall within RCRA's domestic sewage exclusion. Brief In Opposition For Respondents 9 ("Br. in Opp.").

Respondents overlook the language of the DSE, which excludes from RCRA's definition of solid waste "solid or dissolved materials *in* domestic sewage." 42 U.S.C. § 6903 (27) (emphasis added). The exclusion does not require that a discharge consist of sanitary wastes alone, but instead exempts any stream of waste where materials are commingled with sanitary wastes.[1] The waste stream at issue here fits squarely within this language.[2]

Respondents also argue that the DSE does not apply here because another clause of Section 1004(27) deals with industrial discharges, and it exempts only those "industrial discharges which are point sources subject to

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[1] Respondents make the puzzling argument (Br. in Opp. 8) that the DSE cannot serve as a boundary between RCRA and the Clean Water Act because RCRA Section 7003 is not RCRA's permitting section and therefore does not regulate conduct. In fact, RCRA Section 1004(27) sets the outer boundaries of Section 7003 (and all other relevant provisions of RCRA) by defining what is and what is not "solid waste" and, thus, hazardous waste. Section 7003(a), 42 U.S.C. § 6973(a), is controlled by § 1004(27) because § 7003(a) is confined in scope to enforcement actions involving "past or present handling, storage, treatment, transportation or discharge of any *solid waste* or *hazardous waste* . . ." (emphasis added).

[2] Respondents repeatedly attempt to draw a distinction between "domestic sewage" and "industrial waste." *See* Br. in Opp. 11, 12, 15, 16. In fact, the term "industrial waste" is nowhere defined, or even used, in RCRA.

permits" under Clean Water Act Section 402, 33 U.S.C. § 1342. Br. in Opp. 9. However, RCRA does not state that this "point source exclusion" is the only exclusion that applies to discharges from factories. In fact, the statutory scheme indicates the opposite because RCRA and the Clean Water Act overlap in more than one place. First, the Clean Water Act imposes pretreatment standards on those factories, such as petitioners', that discharge wastes to sewer systems serving POTWs. Section 307(b), 33 U.S.C. § 1317(b). Second, the Act requires factories that directly discharge wastes into navigable waters to obtain an NPDES permit from the EPA or qualified state regulator. Section 402, 33 U.S.C. § 1342. In each case, where the Clean Water Act regulates a waste stream, RCRA provides a corresponding exclusion. In view of Congress' specific direction that RCRA should not be construed to apply to "any activity or substance" already regulated by the Clean Water Act (RCRA Section 1006(a), 42 U.S.C. § 6905(a)), it is clear that different exclusions set forth in Section 1004 (27) can apply to different types of discharges from factories.[3]

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[3] Respondents also contend that petitioners' interpretation of the DSE would create a "massive loophole" because the pretreatment standards of the Clean Water Act apply only to wastes discharged to POTWs, while the district court's construction of the DSE would exempt all waste that is mixed with domestic sewage, even if it were not destined for a POTW. Br. in Opp. 11-12. The point source exclusion in Section 1004(27), however, precludes such a loophole. Thus, if a factory were a direct discharger of domestic sewage as respondents posit, it would be required to obtain a point source discharge permit and would fall under the point source exclusion.

Moreover, EPA's regulatory definition of the DSE directly addresses this issue. The regulation's exclusion of mixed waste streams covers "[a]ny mixture of domestic sewage and other wastes that passes through a sewer system *to a publicly-owned treatment works for treatment.*" 40 C.F.R. § 261.4(a)(1)(ii) (emphasis added).

B. The Court Of Appeals' Decision Is Not Consistent With EPA's Regulatory Definition Of The Domestic Sewage Exclusion

Respondents argue that EPA's regulatory definition of the domestic sewage exclusion, 40 C.F.R. § 261.4(a)(1), is consistent with the court of appeals' decision because the regulation does not apply to actions brought under RCRA Section 7003. Br. in Opp. 12-14. Respondents predicate their argument on a prefatory section of 40 C.F.R. Part 261, which states that the regulations identify "only some of the materials which are solid wastes" under RCRA and that "[a] material which is not defined as a solid waste in this part" is still a solid waste for purposes of Section 7003 "if the statutory elements are established." 40 C.F.R. § 261.1(b)(2).

Respondents confuse two different things. The purpose of Part 261 is to define generally the substances and materials that are to be considered "solid wastes" and "hazardous wastes." Thus, its Subpart A gives general definitions of those two terms, Subpart B sets forth criteria for identifying hazardous wastes, Subpart C describes characteristics of hazardous wastes, and Subpart D lists hazardous wastes. The prefatory section to Part 261 (§ 261.1(b)(2)) and the supplementary information EPA provided in its May 19, 1980 Notice of Final Rulemaking for Part 261 (the "1980 Notice") state, nevertheless, that the Part's listing of hazardous substances was definitive only for purposes of certain sections of RCRA, but not all. *See* 40 C.F.R. § 261.1(b)(2); 45 Fed. Reg. 33084, 33090 (May 19, 1980). In particular, the Part's listing of solid and hazardous wastes was not exhaustive for purposes of Section 7003. *Ibid.*

But Section 261.1(b)(2) and the 1980 Notice do not go so far as respondents claim. Section 261.1(b)(2) and the Notice state only that substances which are not defined as "solid" or "hazardous" wastes in Part 261 may still be considered solid or hazardous wastes under

Section 7003 under some circumstances. The Section and the Notice do not stand for the converse proposition, namely, that substances specifically defined as *not being* solid or hazardous wastes in Part 261 will nonetheless be so considered under Section 7003. Contrary to respondents' claim (Br. in Opp. 14), there is no evidence in Section 261.1(b)(2) or in the Notice that Section 7003 would operate completely unrestricted by EPA's regulatory definition of the domestic sewage exclusion.[4]

C. The Narrow Construction Of The Domestic Sewage Exclusion EPA Urged In Its Amicus Curiae Brief Below Was Not One That EPA Officially Adopted Or Consistently Held

Respondents argue that the court of appeals was correct in relying upon the positions the EPA advanced in its *amicus curiae* brief below because the construction of RCRA that EPA urged below was a longstanding one with the agency. In fact, respondents are unable to identify a single EPA rule or official pronouncement to support this claim. Although respondents contend (Br. in Opp. 10-11) that EPA's internal, typewritten *Guidance For Implementing RCRA Permit-By-Rule Requirements*

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[4] Later in their brief, respondents make the extreme argument that Section 7003 was drafted so broadly as to override *all* limitations in RCRA. *See* Br. in Opp. 16-17 n.12. Respondents base this claim on the Section's introductory language, which gives EPA's Administrator the right to bring certain enforcement actions "[n]otwithstanding any other provision" of RCRA if he finds "an imminent and substantial endangerment to health or the environment." Section 7003(a), 42 U.S.C. § 6973(a). A more logical reading of the Section is that this language is a reference to procedural limitations imposed on the Administrator elsewhere in RCRA. *See, e.g.*, RCRA Section 1006(b), 42 U.S.C. § 6905(b) (enjoining the Administrator to avoid regulatory duplication in enforcement of RCRA). Moreover, this language is found only in RCRA Section 7003, not in the citizen suit provisions of § 7002, 42 U.S.C. § 6972, upon which this lawsuit is based.

At POTWs was "published" because it was available to the general public and distributed to all regional EPA offices and state enforcement personnel, they do not provide a citation to any public source where the *Guidance* appeared, nor advance any authority for the proposition that internal agency documents setting forth enforcement positions should receive deference from courts.

Nor can respondents properly claim that the position EPA advanced below—that the domestic sewage exclusion is applicable only where waste from factories flows into a sewer system that also serves houses—is one EPA has consistently held. *See* Br. in Opp. 21. In fact, EPA's regulatory definition of the DSE has been otherwise for a decade, excluding from RCRA:

> (ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

40 C.F.R. § 261.4(a)(1). Likewise, EPA's Notice of Final Rulemaking for this regulation clearly stated that EPA read RCRA's domestic sewage exclusion broadly and that EPA thought this was Congress' intent.[5] Indeed,

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[5] EPA's 1980 Notice stated that:

> The exclusion of domestic sewage and mixtures that pass through sewer systems to POTW's is based on Congressional intent, not an Agency determination about the relative health and environmental risks presented by such waste streams. The Agency acknowledges that some mixtures of domestic sewage with other wastes may present environmental risks . . . . In response, the EPA can only assume that such factors were not determinative in the Congress' creation of the exclusion.
>
> The proposed regulation did not contain a specific definition of domestic sewage. *EPA believes that the definition of domestic sewage, and the provision relating to mixtures of wastes with domestic sewage, contained in these regulations is a rea-*

EPA wrote in the 1980 Notice that its regulatory definition of domestic sewage was "a reasonable interpretation of RCRA's statutory language and legislative history." 45 Fed. Reg. 33084, 33098 (May 19, 1980).[6]

Respondents correctly state (Br. in Opp. 20-21) that Congress encouraged EPA and the Department of Justice to file *amicus curiae* briefs where appropriate to assure orderly and consistent development of the law. However, it is a long—and unprecedented—step from this proposition to the one the court of appeals adopted. Nowhere in the legislative history of RCRA or any other statute has Congress written that the positions the government takes in its *amicus* briefs are to be treated as

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sonable interpretation of RCRA's statutory language and legislative history.

45 Fed. Reg. 33084, 33098 (May 19, 1980) (emphasis added). According to the Notice, EPA considered defining domestic sewage in other ways, but did not. One of the alternative definitions was to

> (4) Link[] the exemption for mixtures to those that flowed into a "publicly-serving" or "constructed-to-serve-the-public" treatment works, rather than POTWs.

Ibid. This alternative definition—which EPA specifically rejected in its final rule—is substantially the same construction that EPA urged upon the court of appeals. *See* EPA Br. at 17-19.

[6] Respondents argue (Br. in Opp. 18-19) that evidence of EPA's consistency in its view is found in EPA's 1986 Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works. Respondents claim that, since language in the Report states that Section 7003 is an authority "in appropriate cases" to address problems of wastes evaporating from sewers, the DSE could not apply here because these would be the very wastes the DSE was supposed to exclude altogether from RCRA. *Id.* at 19.

Respondents ignore the fact that EPA's Report addressed, in addition to the DSE itself, the broader issue of *all* hazardous wastes discharged to POTWs. *See, e.g.*, Report at 6-1, 7-1. Consequently, there would be no anomaly in using Section 7003 to address discharges not exempted by the DSE.

if they were agency regulations, rulings or administrative practice. In and of itself, an agency *amicus* brief is entitled to deference only for the power of its arguments, and nothing more.

D. Certiorari Should Be Granted Because The Decision Below Conflicts With Applicable Decisions Of This Court

Respondents argue that the petition should not be granted because there is no conflict among the circuits in construing the domestic sewage exclusion. Br. in Opp. 7-8. However, the considerations that guide the Court's discretion are broader than that. The court of appeals decided that arguments advanced in a government agency's *amicus curiae* brief were entitled to the same deference that a court would ordinarily give to an agency's regulations, interpretive rules or longstanding practice.[7] *See* Pet. App. 11a-16a. This is flatly in conflict with the clear precedents of this Court. *See Bowen v. Georgetown University Hospital*, 109 S. Ct. 468, 473 (1988); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971). Indeed, the court of appeals' error was compounded by the fact that, not only did it give "considerable weight" (Pet. App. 13a) to EPA's positions, but it also gave this weight to agency positions that were inconsistent with those the EPA previously had espoused. *See* pp. 6-7 n.5, *supra*. *See Bowen v. Georgetown University Hospital*, *supra*, 109 S. Ct. at 474; *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). It is clear that the court of appeals has decided an important question of law "in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

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[7] Indeed, the court of appeals wrote that the position of the EPA was the "most important[]" of all the reasons it relied upon in reversing the district court. Pet. App. 11a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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